IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2186 of 2007
With
SPECIAL CIVIL APPLICATION No. 3514 of 2007
with
CIVIL APPLICATION Nos. 10265 and 10257 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **Yes**

2 To be referred to the Reporter or not ? **Yes**

3 Whether their Lordships wish to see the fair copy of the judgment ? **No**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **No**

5 Whether it is to be circulated to the civil judge ? **No**

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JINDAL POWER LTD. & 1 - Petitioner(s)
Versus
GUJARAT URJA VIKAS NIGAM LTD. & 1 - Respondent(s)

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Appearance :
SPECIAL CIVIL APPLICATION No. 2186 of 2007

MR KS NANAVATI, SR. ADVOCATE WITH MR NANDISH CHUDGAR FOR NANAVATI ASSOCIATES for Petitioner(s) : 1 - 2.
MR KAMAL TRIVEDI, SR. ADVOCATE WITH MR NK MAJMUDAR for Respondent(s) : 1,
MR PREMAL R JOSHI for Respondent(s) : 1,
DELETED for Respondent(s) : 2,

SPECIAL CIVIL APPLICATION No. 3514 of 2007

MR MIHIR JOSHI, SR. ADVOCATE FOR SINGHI & Co. for Petitioner(s) : 1.
MR KAMAL TRIVEDI, SR. ADVOCATE WITH MR NK MAJMUDAR for Respondent(s) : 1,
MR PREMAL R JOSHI for Respondent(s) : 1,
MR HARIN P RAVAL for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 24/09/2007
COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

These petitions filed by M/s Jindal Power Ltd. and PTC India Limited challenge the communications dated 12.1.2007 of Gujarat Urja Vikas Nigam Ltd. (hereinafter referred to as “the first respondent” or “the Corporation”) cancelling the Letters of Intent which were awarded to the petitioners on 8.12.2006 for entering into Power Purchase Agreements.

2. FACTS

2.1 M/s Jindal Power Ltd. (petitioner in SCA No. 2186 of 2007) is engaged in the business of the generation and sale of electricity. PTC India Ltd. (formerly known as Power Trading Corporation of India Ltd. - petitioner in SCA No. 3514 of 2007) is a Government of India initiated Public-Private Partnership, whose primary focus is to develop a commercially vibrant power market in the country.

2.2 The first respondent Gujarat Urja Vikas Nigam Ltd. (Gujarat Energy Development Corporation Ltd.) (hereinafter referred to as “the Corporation”) is a company incorporated under the Companies Act, 1956 and is a successor to the erstwhile Gujarat Electricity Board which is now divided into several companies for generation, transmission and distribution of electricity. The first respondent is a holding company for all these companies. The distribution companies in the State of Gujarat are required to source their requirement of power only from the first respondent which is wholly owned by the State Government and there is no dispute about its status as an instrumentality of the State within the meaning of Article 12 of the Constitution.

2.3 By Request for Qualification (RFQ) dated 7.2.2006, the first respondent - Corporation invited the bidders for submitting information for supply of power. It was specifically stated in the advertisement published in the leading newspapers on 2.2.2006 that the Corporation intended to procure power under the three

competitive bidding processes denoted as bid specification numbers 01, 02 and 03 and that following are the salient features of each of the bids:-

	Bid No. 01	Bid No. 02	Bid No. 03
Max/Min capacity	2000MW / 100MW	2000MW / 100MW	2000 MW/1000MW
Fuel	Coal/Lignite	Unspecified	Imported Coal
Term of PPA	25 years	15/25/35 years	25 years
Location	Unspecified	Unspecified	Sarkhadi, Veera Sangath or any other coastal location
Tariff	Variable and Capacity charges are to be quoted for 25 years (year wise) on which no escalations will be allowed	Capacity charges Escalable & Non-escalable Variable charges linked to Index	Capacity charges Escalable & Non-escalable Variable charges linked to Index
Commence-ment of supply	Within 36 months from the signing of PPA	Within 60 months from the signing of PPA	Within 60 months from the signing of PPA

Note : The period for commencement of supply for bid Nos. 2 and 3 was 48 months in the first advertisement dated 2.2.2006, but subsequently that period was changed to 60 months.

2.4 Both the petitioners submitted the required information and the response of both the petitioners to the RFQ came to be accepted by the Corporation. Both the petitioners were also informed that they were qualified to submit the Request for Proposal.

2.5 By Request for Proposal dated 26.6.2006, the Corporation called for bids for purchase of electricity. The Request for Proposal documents contained the proforma Power Purchase Agreement (PPA) and a proforma Escrow Agreement, which had to be initialed by the bidder so as to signify the acceptance of the terms and conditions contained in the said PPA. The bidder was requested to submit a bank guarantee of Rs.5 lakhs per MW of the

capacity for which the bidder had offered to supply the power. Clause 4.6 of the Request for Proposal has been the subject of interpretation and controversy. Hence the entire clause 4.6 is set out hereinbelow :-

"**4.6 Bank Guarantee**

4.6.1 The Bidder shall submit bid accompanied by a refundable deposit of Rs.5 lakhs per MW of the Capacity bid by the Bidder. The aforesaid deposit shall be in form of Bank Guarantee from a Scheduled Bank other than Co-operative Banks valid upto the validity of the bid.

4.6.2 For unsuccessful Bidders/Bidders who do not agree for extension in the validity of the bid, the Bank Guarantee shall be released within 30 (thirty) of placement of order on the selected Bidder(s).

4.6.3 If any successful Bidder fails to sign the PPA within 30 days of the letter of award, the same shall constitute sufficient ground for annulment of the award to such Bidder and invocation of Bank Guarantee provided by such Bidder.

4.6.4 The successful Bidders shall enhance the value of the Bank Guarantee to 7.5 Lakhs per MW of Contracted Capacity before execution of the PPA, at sole cost of the Bidder. The enhanced bank guarantee shall be held by GUVNL against performance of the Bidder as per terms of the PPA. This enhanced Bank Guarantee shall have validity upto six months after the envisaged Scheduled Commercial Operation Date of the project.

4.6.5. The Bank Guarantee can be invoked on account of (but not limited to) the following :-

(a) Failure to sign PPA within 30 days from the date of letter of award, unless the date of signing is extended with mutual consent.

(b) Failure of Bidder to complete any of the conditions subsequent on schedule as per PPA.

(c) Delay in achieving Commercial Operation on schedule as detailed in the PPA.

(d) Any Bidder Event of Default, as detailed in PPA.

4.6.6 Wherever relevant, the provisions of the PPA shall guide the periodicity and quantum of invocation of the Bank Guarantee."

2.6 Three parties submitted their Request for Proposal for bid No. 1.

Name of Party	Power offered	Rate per unit in Original Bid	EMD Bank Guarantee furnished
M/s Adani Enterprises Ltd	500 MW	Rs.3.7038	Rs.25.0 crores
M/s Jindal Power Ltd.	150 MW	Rs.3.4801	Rs. 7.5 crores
PTC India Ltd.	190 MW (Chitarpur)	Rs.3.2502	Rs. 9.5 crores
	250 MW (Ratnagiri)	Rs.3,4947	Rs.12.5 crores

The Bid Evaluation Committee opined that the rates quoted by the bidders for bid No. 1 were on the higher side. On 9.11.2006, the Corporation, therefore, re-invited financial bids from the bidders who had already submitted their RFQ documents.

2.7 All the three parties, therefore, submitted their revised financial bids and also the quantum of power offered for sale whereupon the following picture emerged :-

Name of Party	Power offered	Rate per unit
M/s Adani Enterprises Ltd	1000 MW	Rs.3.2939
M/s Jindal Power Ltd.	150 MW	**Rs.3.2483**
PTC India Ltd.	(190+250)=440 MW	Rs.3.2497
Total contract capacity of all successful bidders	1590 MW	

Thereafter on 7.12.2006, the Bid Evaluation Committee

recommended that the Corporation may buy at the lowest tariff quoted under the revised financial bid offered by Jindal Power under bid No. 1 i.e. **Rs.3.2483**.

2.8 Both Adani Enterprises and PTC India communicated their acceptance to match the lowest levallised tariff to Rs.3.2483 per unit as offered by Jindal Power and, therefore, on 8.12.2006, the Corporation issued Letter of Intent to each of the three successful bidders for the following rates for bid No. 1 :-

Name of Party	Power offered	Rate per unit
M/s Adani Enterprises Ltd (respondent No.2)	1000 MW	Rs.3.2483
M/s Jindal Power Ltd. (petitioner)	150 MW	Rs.3.2483
PTC India Ltd. (petitioner)	(190 + 250) 440 MW	Rs.3.2483
Total contract capacity of all successful bidders	---------- 1590 MW	

It appears that after receipt of the aforesaid Letter of Intent, PTC India wrote a letter on the same day expressing its intention to increase the quantum of power from 190 MW to 380 MW with reference to the supply of power from Chitarpur Coal & Power Ltd.. However, the Corporation did not consider it on the ground that it was received after issuance of the Letter of Intent.

2.9 On 11.12.2006, the Corporation sent a soft copy of the Power Purchase Agreement (PPA) to each successful bidder with a request to fill in the relevant information in the soft copy and return the same to the Corporation. On 18.12.2006, Jindal Power returned the soft copy of the PPA to the Corporation incorporating the relevant details. Similarly on 22.12.2006, PTC India informed the Corporation that the soft copy of the PPA was sent by e-mail and that it may be informed about the date for signing the PPA. On 28 & 30.12.2006, all the three bidders visited the Office of the

Corporation. On 1.1.2007, Jindal Power requested the corporation to indicate the convenient date for signing of PPA. On 6.1.2007, Adani Enterprises furnished the bank guarantees for Rs.7.50 lacs per MW aggregating to Rs.75 Crores for 1000 MW of power offered under bid No. 1. On 8.1.2007, Adani Enterprises held a meeting with the Corporation and agreed to reduce the levallised tariff from Rs.3.2483 per unit to Rs.2.89 per unit. On the same day, the Corporation took a decision to cancel the Letter of Intent issued to Jindal Power and to PTC India on the ground that they failed to submit the performance bank guarantee of Rs.7.5 lacs per MW for the offer accepted within the time limit of 30 days from the date of issuance of Letter of Intent. On 10.1.2007, Jindal Power requested the Corporation to indicate the convenient date for signing of PPA. On 12.1.2006, the Corporation issued revised Letter of Intent to Adani Enterprises for supply of power at the rate of Rs.2,89 per unit and cancelled the Letter of Intent issued to the petitioners i.e. Jindal Power and PTC India and returned back their earnest money bank guarantees of Rs. 7.5 Crores and Rs. 22 Crores respectively.

3. ORDERS IN THE PETITION OF M/S JINDAL POWER LTD.

3.1 On 22.1.2007, Jindal Power filed Special Civil Application No. 2186 of 2007. When the petition came up for preliminary hearing on 24.1.2007, another Division Bench of this Court issued notice and granted ex-pate ad-interim injunction in the following terms :-

> "Notice returnable on 9th February, 2007. Shri N.K. Majmudar appearing on caveat wavies service for respondent.
>
> Shri N.K. Majmudar prays for time to file affidavit opposing admission and grant of interim relief in the matter, as according to him the respondent had already sent a letter of intent to third party. Shri Shantibhushan

learned Senior Advocate appearing with Shri Nandish Chudgar for the petitioners has no objection to it. However, Shri Shantibhushan submitted that till the next date of hearing, the respondent may stay their hands in executing contract in favour of the third party. Shri Majmudar learned counsel for the respondent is not in a position to make any statement.

In view of the above, till next date of hearing, the respondent is directed to maintain status quo as on today. Put up on 9th February, 2007."

3.2 Adani Enterprises Ltd. (respondent No.2) filed Civil Application No.1592 of 2007 for being joined as a party respondent in the writ petition of Jindal Power Ltd.. By the same application, Adani Enterprises Ltd. also prayed for vacating the ad-interim injunction. By order dated 2.2.2007, the Court granted the prayer for joining Adani Enterprises Ltd. as a party respondent and preponed the hearing of the main writ petition to 6.2.2007.

3.3 On 6.2.2007, the Division Bench vacated the stay order by passing the following order in the matter of M/s Jindal Power Ltd. :-

"Learned Advocate General Shri Trivedi for the respondent No.1 – Nigam states that in the event of the petitioners finally succeeding in the matter they will be accommodated for the purpose of bid No.1 in respect of their offered quantity of 150 MW of Power. On this statement being made, learned Counsel Shri Shanti Bhushan, appearing for the petitioner states that he is not pressing interim relief prayed in this petition and he seeks permission to delete newly added respondent No.2 from the arena of cause title of this petition. Accordingly, respondent No.2 stands deleted from the cause title of this petition.

Rule. Learned Counsel Shri N.K.Majmudar waives service for respondent No.1 – Nigam.

We clarify that ad interim relief granted earlier stands vacated and pendency of this petition shall not come in the way of respondent No.1 in entering into contract with the former respondent No.2."

[emphasis supplied]

4. Orders in Petition of PTC India Ltd.

4.1 On 5.2.2007, PTC India filed Special Civil Application No. 3514 of 2007 and on 6.2.2007 when the petition of Jindal Power came up for hearing, a request was made on behalf of PTC India to take up their matter for hearing. However, the petition of PTC India was permitted for circulation on 7.2.2007.

4.2 When the petition of PTC India as well as the application filed by PTC India for joining Adani Enterprises as a party respondent (Civil Application No.1891 of 2007) came up for hearing on 7.2.2007, the Court passed the following order:-

> "Learned Advocate General Shri Trivedi appearing for the respondent-Nigam (Corporation) vehemently objected regarding grant of Civil Application No.1891 of 2007 for impleading third party (Adani Enterprises Ltd.) as party respondent to this petition. According to him, the third party is not a necessary party and the dispute is between the petitioner and the respondent-Nigam. On the advance copy of the petition being served upon him, he states that they will file a detailed reply-affidavit on or before 12th February 2007. Rejoinder, if any, to be filed on or before 15th February 2007.
>
> Put up on 19th February 2007."

4.3 When the petition came up for hearing on 22.2.2007, the Court admitted the petition of PTC India and passed the following order on the question of interim relief and also ordered the petition to be heard with the writ petition of Jindal Power :-

> "Learned Advocate General Shri Trivedi for the respondent-Nigam states that in the event of the petitioner finally succeeding in the matter, they will be accommodated for the purpose of bid No.1 in respect of their offered quantity of 440 MW of power.
>
> In view of the above statement, there is no question of granting of any interim relief in this matter, as the same was refused as not pressed in Special Civil Application No.2187

of 2007 on 6th February 2007."

[emphasis supplied]

4.4 PTC India carried the matter before the Hon'ble Supreme Court and the Special Leave Petition came to be disposed of on 26.3.2007 in terms of the following order:-

> "We do not want to interfere with the impugned interim order passed by the High Court specially in view of the statement made by the Advocate General of the State that in the event the petitioner succeeds, they would be accommodated for the purpose of bid No.1 in respect of their offered quantity.
>
> We would request Hon'ble Chief Justice of the Gujarat High Court to direct the office to list the matter for final disposal at an early date and if possible, within six months from today."
>
> [emphasis supplied]

4.5 Civil Application No.1891 of 2007 thereafter again came up for hearing and by our order dated 26.4.2007 we permitted PTC India to join Adani Enterprises Ltd. and M/s. Adani Power Ltd. as respondent Nos.2 and 3 respectively. The petitioner was also permitted to amend the petition to refer to the Power Purchase Agreement executed by the respondent-Corporation in favour of M/s. Adani Power Pvt. Ltd. on 6.2.2007 in bid No.1 for 1000 MW at the rate of Rs.2.89 per unit.

5. Both the writ petitions were accordingly listed before us for final hearing. Several affidavits have been filed on behalf of the respondent-Corporation. Affidavits-in-rejoinder have also been filed by the petitioners. We have heard the learned counsel for the parties. During the course of hearing, the petitioners filed Civil Application for production of documents. By our order dated 22.8.2007, we directed the Corporation to place on record the details of power purchase agreements executed and also particulars about power purchased from different parties on short term basis since April 2006.

6. Petitioners' stand regarding Rate

Mr KS Nanavati, learned Senior Counsel for Jindal Power and Mr Mihir Joshi, learned Senior Counsel for PTC India made common ground in challenging communications dated 12.1.2007 cancelling the Letters of Intent dated 8.12.2006 granted in favour of the respective petitioners, but Mr Nanavati for Jindal Power submitted that since the Letter of Intent dated 8.12.2006 was for supplying power at the rate of Rs.3.2483 per unit, Jindal Power was prepared to supply power only at that rate under bid No.1 and that it was not prepared to match the rate of Rs.2.89 per unit at which rate the Power Purchase Agreement has been signed by the respondent-Corporation and M/s. Adani Power Pvt. Ltd.

However, Mr Mihir Joshi for PTC India specifically stated that PTC India was and is ready and willing to sign the Power Purchase Agreement with the respondent-Corporation for offering 440 MW of power at the rate of Rs.2.89 per unit and that the other terms and conditions of the Power Purchase Agreement should be the same as the terms and conditions of the Power Purchase Agreement already executed by the respondent-Corporation in favour of respondent No.3-M/s. Adani Power Pvt. Ltd.

7. Petitioners' Submissions on Merits regarding legality of the cancellation of LOI

7.1 As regards the challenge to the communications dated 12.1.2007 (based on the respondent-Corporation's decision dated 8.1.2007) to cancel the Letters of Intent dated 8.12.2006, both the learned counsel for the petitioners have vehemently submitted that

as per Clause 4.6.1 the petitioners had submitted the bank guarantees for Rs.7.50 crores (Jindal Power) and Rs.22 Crores (PTC India) respectively. As per Clauses 4.6.3 and 4.6.5 of the RFP, a successful bidder was required to sign the Power Purchase Agreement within 30 days of the letter of award, unless the date of signing was extended with mutual consent. After sending the Letters of Intent dated 8.12.2006, the Corporation sent on 11.12.2006 a soft copy of the Power Purchase Agreement to the successful bidders (i.e. Adani Enterprises, Jindal Power and PTC India) with a request to fill in the relevant information in the soft copy and return the same to the Corporation. The petitioners filled in all the relevant details in the soft copy of the Power Purchase Agreement in the month of December 2006 itself and were requesting the respondent-Corporation to indicate the date on which the Power Purchase Agreements were to be signed by the respondent-Corporation with the petitioners. To be precise --

(a) Jindal Power returned the soft copy of the PPA to the Corporation incorporating the relevant details on 18.12.2006. On 28 & 30.12.2006, a representative of Jindal Power visited the office of the Corporation and by letter dated 1.1.2007 (Annexure - P10) Jindal Power requested the Corporation to indicate the convenient date for signing of PPA and again repeated that request on 10.1.2007 (Annexure - P11).

(b) Similarly, PTC India informed the Corporation on 22.12.2006 (Annexure “K”) that the soft copy of the PPA was sent by e-mail and requested that it may be informed about the date for signing PPA and representative of PTC India also visited the office of the Corporation on 28 & 30.12.2006. In paragraph 17 of the petition of PTC India, the following averments are made :-

> "The petitioner submits that they had completed and returned the Draft Power Purchase Agreement with a request to the Respondent to inform them the formal date of signing the same. Thereafter the Respondent's representatives even met the Petitioners' representatives on 11th of January 2007, and informed the Petitioners that the same would be signed on 12th January 2007 at the venue of the "Vibrant Gujarat Meeting" in Ahmedabad. Hence for the Respondent to then cancel the Letter of Intent is clearly non-est and in violation of the terms of the Agreement as well as the principles of natural justice and thus without jurisdiction and de hors any authority and illegal."

Accordingly, within a week of receiving the soft copy of the Power Purchase Agreement, the petitioners filled in the relevant information in the soft copy and returned the same to the respondent Corporation by 18/22.12.2006 and both the parties requested the respondent Corporation by letters dated 22.12.2006 (PTC India) and 1.1.2007 (Jindal Power) requesting the respondent Corporation to indicate the convenient date for signing the Power Purchase Agreement.

7.2 Both the petitioners were ready and willing to enhance the value of the bank guarantee to Rs.7.5 crores per MW of contracted capacity before execution of the Power Purchase Agreement as required by Clause 4.6.4 of RFP. It is submitted that both the petitioners had financial capability to furnish such bank guarantees to the tune of Rs.11.25 crores in case of Jindal Power and Rs. (14.25 + 18.75 = 33) crores in case of PTC India. In fact, PTC India had already got ready the bank guarantee for Rs.14.25 crores on 5.1.2007 and photostat copy of such bank guarantee No.1 of 2007 for the amount for Rs.14.25 crores issued by Syndicate Bank is also produced at Annexure-"L", which was sufficient for

the capacity of 190 MW of power, to be supplied from Chitrapur. Jindal Power has also produced letter dated 11.06.2007 of State Bank of India stating that State Bank of India, New Delhi could have issued additional bank guarantee for Jindal Power at a very short notice and that Jindal Power has financial capability to furnish the bank guarantee of at least ten times the additional guarantee required to be furnished.

7.3 The learned counsel have submitted that the time limit stipulated in Clause 4.6.3 of RFP was for signing PPA for which the petitioners had filled in the required details in the soft copy and sent the same to the respondent Corporation as far back as on 18.12.2006 (Jindal Power) and on 22.12.2006 (PTC India). If the respondent Corporation had indicated the date for signing PPA, the petitioners would have immediately furnished the bank guarantee before the date which was to be indicated by the Corporation for signing PPA. It is also submitted that sub-clause (a) of 4.6.5 of the RFP also specifically provided that the date of signing PPA could be extended with mutual consent and, therefore, the petitioners were of the bona fide belief that there could be no question of cancellation of the Letters of Intent dated 8.12.2006 unless and until the petitioners did not turn up to sign PPA on the date to be indicated by the respondent Corporation for which the petitioners had been requesting since 18/22.12.2006. The petitioners were never called upon to sign PPA by 6.1.2007 or submit the bank guarantees by 6.1.2007 and, therefore, they did not furnish the bank guarantee by 6.1.2007. Hence, the petitioners could not be visited with the penalty of cancellation of the Letter of Intent. It is submitted that Adani Power had also not signed PPA by 6.1.2007 and, therefore, the treatment meted out by the Corporation to the petitioners is discriminatory and arbitrary.

7.4 It is further submitted by the learned counsel for the petitioners, and particularly Mr. Mihir Joshi, learned counsel for

PTC India that Adani Enterprises (respondent No.2) had submitted the tender for bid No.1, but the contract is ultimately awarded to Adani Power Pvt. Ltd. (respondent No.3). Apart from this favourable treatment extended to Adanis, though Letters of Intent were issued by the Corporation to all the three successful bidders on 8.12.2006 for purchasing power at the rate of 3.2483 per unit, the Adanis were also given an opportunity on 8.1.2007 to reduce their rates from Rs.3.2483 per unit to Rs.2.89 per unit without giving a similar opportunity to PTC India and Jindal Power. It is submitted that the opportunity to reduce the rate given to Adanis behind the back of PTC India and Jindal Power was also illegal and arbitrary.

8. To sum up, the learned counsel for PTC India has raised following specific contentions :-

(1) There being no stipulation of time for submitting the enhanced bank guarantee under the Request for Proposal (RFP), the cancellation of the Letter of Intent issued to the petitioner by Corporation is unjustified and illegal.

(2) The contention of Corporation that such a condition had to be read in the stipulation in the RFP regarding execution of PPA within 30 days of the LOI still does not justify interpreting and enforcing such implied condition as a mandatory term warranting automatic forfeiture or rights of the awardee, while considering the express term in relation to execution of PPA as directory.

(3) The conduct of Corporation of not responding to communications of the petitioner regarding signing of PPA, at no stage calling upon the petitioner to submit the enhanced bank guarantee, holding discussions for finalization of PPA on 11.1.2007 (much after the expiry of the 30 day period on

6.1.2007), calling the petitioner for execution of PPA on 12.1.2007 etc. clearly imply an extension of the time period for executing PPA and consequently, on the interpretation of Corporation itself, extension of the time for submitting the enhanced bank guarantee.

(4) In retrospect, the aforesaid actions of Corporation were not bona fide, but with a view to engineer a default.

8A. The learned counsel for the petitioners has also made the following specific statements on 03.09.2007 :-

> "The petitioner states that in the event of the Hon'ble Court allowing this petition, it stands by its offer to sell 440 M.W. of power to GUVNL i.e. at a Levelised Tariff of Rs.2,89/kWH as per the tariff stream to be submitted to GUVNL, for a period of 25 years commencing from three years from the execution of the Power Purchase Agreement in favour of the petitioner.
>
> The petitioner shall make best effort to commence such supply by March 2010 on the assumption of the Power Purchase Agreement being executed in September 2007, but any default in complying with this assurance of commencing supply before a period of three years from the execution of the Power Purchase Agreement should not entail any penalty by way of liquidated damages or otherwise as contemplated in the said Agreement."

Submissions of Respondent-Corporation

9. On the other hand, Mr. Kamal Trivedi, learned Advocate General for the respondent Corporation has made the following submissions:-

9.1 As per the tender documents, there is a clear distinction between Earnest Money Deposit bank guarantee at the rate of Rs.5 lacs per MW of the capacity offered (Clause 4.6.1) on the one hand and the enhanced bank guarantee i.e. performance bank guarantee

at the rate of Rs.7.5 lacs per MW of the capacity contracted (as per Clause 4.6.4). Both the petitioners had furnished only Earnest Money Deposit bank guarantee at the rate of Rs.5 lacs per MW of the capacity offered, but neither of them had furnished the performance bank guarantee at the rate of Rs.7.5 lacs per MW of the contracted capacity.

9.2 PTC India had furnished Earnest Money Deposit bank guarantee of Rs.22 crores (Rs.5 lacs X 440 MW offered) whereas the total amount of performance bank guarantee required to be furnished by the said petitioner was Rs.33 crores (i.e Rs.7.5 lacs X 190 MW = Rs.14.25 crores and Rs.7.5 lacs X 250 MW = Rs.18.75 crores, Rs.14.25 + Rs.18.75 = Rs.33 crores). The Earnest Money Deposit bank guarantee and the performance bank guarantee are thus, different in amounts, formats and validity period. Neither of the petitioners had furnished the performance bank guarantee.

9.3 In view of Clause 4.6.4 of RFP document, the performance bank guarantee was required to be given before execution of the Power Purchase Agreement and the Power Purchase Agreement was to be signed within 30 days of the letter of award (i.e. Letter of Intent dated 8.12.2006 as per Clause 4.6.3). Thus, a combined reading of the said Clauses suggests that furnishing of the performance bank guarantee was the essential pre-condition to the execution of the Power Purchase Agreement. Clause 3.1.1 of the draft Power Purchase Agreement also provides that the seller shall have provided the security deposit meaning thereby furnishing the performance bank guarantee was an essential pre-condition to the execution of the Power Purchase Agreement.

9.4 Mere exchange of communications, confirming the sending of soft copy of the Power Purchase Agreement and asking the Corporation to indicate the date of signing the Power Purchase

Agreement etc. cannot be considered to be a compliance of the obligation of the petitioners, more particularly, in view of Clause 4.1.4 of the RFP (Page-44) that all charges for preparing the Power Purchase Agreement including the legal fee, stamp fee, etc. are to be borne by the successful bidder and is to be signed in originals. It is submitted that exchange of communications in respect of the Power Purchase Agreement cannot be substituted for the actual execution of the Power Purchase Agreement.

9.5 It is also stated that PTC India was never invited to finalize and execute the PPA during the course of Vibrant Gujarat Summit on 12.1.2007 and that no such discussion had ever taken place in this behalf on 11.1.2007 in the office of the respondent Corporation.

9.6 As regards the Power Purchase Agreement with M/s. Adani Power Pvt. Ltd., it is submitted that although initial offer was made by respondent No.2 – M/s. Adani Enterprises Ltd. in view of the provisions contained in the notice inviting the tenders read with Clauses 2.2.2, 2.2.3, 3.2.2 and 4.2.2.1 of RFQ document read with the respective board resolutions passed by respondent Nos.2 and 3 on 3.1.2007 and 4.1.2007, it was permissible for the Corporation to enter into the Power Purchase Agreement with respondent No.3 – M/s. Adani Power Pvt. Ltd.

9.7 Respondent No.2 – M/s. Adani Enterprises Ltd. had complied with all the necessary tender conditions including the essential pre-condition of furnishing of performance bank guarantee on 6.1.2007 i.e. bank guarantee for Rs.75 crores was furnished by them on 6.1.2007. Hence, the respondent Corporation was bound to execute the Power Purchase Agreement.

Second Controversy : Rate

10. We may now refer to the second ground urged by the respondent Corporation to support cancellation of the Letters of Intent issued in favour of the petitioners on 8.12.2006. According to the respondent Corporation while Adani Enterprises had submitted the performance bank guarantee as required by Clause 4.6.3 within the stipulated time of 30 days i.e. on 6.1.2007, the petitioners had not submitted any such performance bank guarantee within the stipulated time which in their case also expired on 6.1.2007 and therefore, while considering the matter on 8.1.2007, the respondent Corporation also took into consideration the fact that when bid Nos.2 and 3 were opened, the respondent Corporation had received lower tariff offers as under:-

Sr. No	Name of Parties	Bid No.	Capacity MWs	Levelised tariff Rs. per unit
	(A)	(B)	(C)	(D)
1	Aryan Coal Benefication Pvt. Ltd.	Bid No.2	200	2.25
2	Adani Power Pvt. Ltd. (Respondent No.3)	Bid No.2	1000	2.35
3	Essar Power Ltd.	Bid No.3	1000	2.40

11. On the other hand, the petitioners have submitted through their learned counsel that -

11.1 If lower tariff under Bid Nos.2 and 3 was a consideration which weighed with the respondent Corporation, the respondent would not have signed the Power Purchase Agreement with respondent No.3 on 6.2.2007 for purchasing power at the rate of Rs.2.89 per unit under Bid No.1. It is also submitted that apart from the fact PTC India was not given any opportunity to match the rate of Rs.2.89 offered by Adani Enterprises on 8.1.2007, the

tariff rates under bid Nos.2 and 3 cannot be compared with the tariff rates under bid No.1 because under bid No.1 commencement of power supply has to be within **36 months** from the signing of Power Purchase Agreement whereas under bid Nos.2 and 3 supply of power has to commence within **60 months** from signing of the Power Purchase Agreement. Similarly, under bid Nos.2 and 3, the capacity charges are escalable and non-escalable various charges are linked to index whereas in contract under bid No.1 variable and capacity charges are to be quoted for 25 years (year-wise) on which no escalation will be allowed. It is, therefore, submitted that in view of these significant differences, and also the permissible difference in the fuel to be used, the tariff rates under bid Nos.2 and 3 could never be compared with tariff rates under bid No.1. It is also submitted that the respondent Corporation entered into the Power Purchase Agreement with Adani Power (respondent No.3) on 2.2.2007 at the rate of Rs.2.35 under Bid No.2 and with the same company entered into the Power Purchase Agreement under Bid No.1 at the rate of Rs.2.89 per unit on 6.2.2007. This itself shows that the rates under bid No.2 were not relevant for determining the tariff rate under bid No.1.

11.2 The contention of Corporation now, that the UMPP bids, Bid No.02 and 03 offers, etc. indicate availability of power at a rate lower than Rs.2.89 per unit justified not awarding the contracts to the petitioner in any case, is mischievous, mala fide and discriminatory particularly since the same facts were available at the time of execution of PPA with the third respondent, even at the time of making the statement before this Hon'ble Court assuring award of contract to the petitioner in the event the petition succeeded, and as per Corporation itself, Bid No.01 was not comparable to any other.

11.3 It is also submitted that there is admitted shortage of power supply at present and as per the figures which have come on

record through the statements at Annexures E-1 and E-2 produced by the respondent Corporation pursuant to the directions dated 22.08.2007 of this Court in Civil Application No.10257 of 2007, it is clear that from October 2006 when Adani Enterprises (respondent No.2) entered into the power sector as a dealer, till August 2007, the respondent Corporation purchased power on short term basis to the tune of Rs.358.36 crores out of which, power purchased from Adani Enterprises (respondent No.2) was Rs.322.01 crores at the average rate ranging from Rs. 5.31 to Rs.5.45 per unit. It is, therefore, submitted that not giving PTC India the opportunity of matching the tariff at the rate of Rs.2.89 per unit offered by Adani Enterprises / Adani Power and not signing the Power Purchase Agreement with PTC India at the rate of Rs.2.89 per unit has only resulted into the power shortage continuing for a longer period so that the respondent Corporation will be in a position to continue to purchase power on short term basis from Adani Enterprises (respondent No.2). It is submitted that since October 2006, 90% of the power purchased by the respondent Corporation on short term basis is from Adani Enterprises. From October 2006 to August 2007 power purchased from other parties is only Rs.36.35 crores as against the power purchased from Adani Enterprises (respondent No.2) for total of Rs.322.01 crores as per the particulars given in Annexures “E1” and “E2” produced by the respondent Corporation in compliance with our order dated 22.8.2007 in Civil Application.

11.4. Jindal Power Ltd. has made the following offer at the hearing on 30.8.2007:-

> “We are prepared to offer 100 MW power to GUVNL at a levelised tariff of Rs.3.2483 for a period of 7 years to settle the matter.
>
> The other terms & conditions of the offer are as under:-
>
> a) Commencement of Supply of Power – from 16th June

2008
b) Levelised Tariff – 3.2483 Rs./ Unit
c) Detailed pricing yearwise."

12. In reply to the above submissions, learned Advocate General for the respondent-Corporation has submitted that -

12.1 The tariff for short term power purchase is not comparable with the tariff for long term power purchase. Hence, there is nothing wrong in purchasing power on short term basis from Adani Enterprises and others at the rate of Rs.5.31 per unit or any other rate depending on the market conditions. Even short term power purchases to the tune of 1% of the total requirement are effected by floating tender inquiries and the said phenomenon of short term power purchase will not last long in view of the Power Purchase Agreements entered into with different parties for a longer period. The dealer's margin on sale of power on short term basis is very meagre.

12.2 In any case, public interest requires that now in view of availability of lower rates offered by various parties for long term contracts, the petitioners' request to offer power at Rs.2.89 per unit should not be accepted since it would invite substantial burden on public at large.

13. We have also heard Mr Harin Raval for the second and third respondents. However, since the petitioners have not made any specific prayer in the petitions for setting aside the PPA dated 6.2.2007 between the respondent-Corporation and respondent No.3, and since the reliefs prayed for can be granted in favour of the petitioners without setting aside the said PPA dated 6.2.2007 in favour of respondent No.3, we do not think it necessary to set out or deal with Mr Raval's submissions on behalf of the second and third respondents.

DISCUSSION ON THE FIRST CONTROVERSY – Legality of Cancellation of LOI for not furnishing Enhanced Bank Guarantee

14. We are of the view that before discussing the controversy about interpretation of the tender conditions, it is necessary to appreciate that the tender notice in question invited bids for supply of power on long term basis for 2000 MWs under bid No. 1 and the three successful bidders had offered to supply 1590 MW of power in the aggregate under bid No. 1 (paras 2.7 and 2.8 hereinabove). In this view of the matter and particularly in view of the admitted power shortage for the last many years, if the respondent-Corporation was really interested in purchasing power from all the three successful bidders, it would have responded to the petitioners' letters requesting for convenient date to sign PPAs and would have also given an opportunity to the petitioners to reduce their rates so as to match the rate offered by Adani Enterprises i.e. Rs.2.89 per unit. In spite of repeated requests and inquiries from these two petitioners, the respondent-Company did not inform them about the date on which the Power Purchase Agreement was to be signed. The respondent-Corporation did not even reply that the date for signing PPA will be intimated after the petitioners submit enhanced bank guarantee. The respondent-Corporation has not disputed the assertion made by the two petitioner -Companies regarding their financial position that if they had been intimated about the date of signing Power Purchase Agreement, the petitioners would have immediately got the bank guarantees for the requisite amounts by way of performance bank guarantees. In fact, PTC India had already kept ready a bank guarantee for Rs. 14.25 crores on 5.1.2007 which was adequate performance bank guarantee for supplying 190 MWs power form Chitrapur.

15. It is in this context that the defence of the respondent-Corporation based on the provisions of clause 4.6 and particularly clause 4.6.3 of the Request for Proposal documents is required to be considered. The said clause is already set out in para 2.5 of this judgment.

15.1 Clause 4.6.1 required the bidder to submit a refundable Earnest Money Deposit of Rs.5 lakhs per MW of the capacity bid by the bidder in the form of a bank guarantee. This condition was admittedly fulfilled by the petitioners by giving bank guarantees of Rs.7.5 crores (Jindal Power) and Rs.22 crores (PTC India).. That is why they were given the letters of intent on 8.12.2006.

15.2 Since failure on the part of the petitioners to furnish enhanced bank guarantee or performance bank guarantee at the rate of Rs.7.5 lakhs per MW of contract capacity within 30 days of Letter of Intent was the apparent legal ground on which the respondent-Corporation claims to have taken impugned decision, it is necessary first to ascertain whether there was any such time-limit in the first place.

15.3 Clause 4.6.4 did not require the successful bidder to produce the Enhanced Bank Guarantee within any specific time-limit except stating that “the successful bidder shall enhance the value of the bank guarantee to Rs.7.5 lakhs per MW of contracted capacity before execution of PPA, at sole cost of the bidder”.

15.4 The only time-limit provided was in clause 4.6.3 which provided for signing the Power Purchase Agreement within 30 days of the letter of award. It is significant to note that what the respondent-Corporation issued to all the three successful bidders on 8.12.2006 was “Letter of Intent” and not “letter of award”. Hence strictly speaking, the respondent-Corporation cannot be

permitted to rely on clause 4.6.3 for contending that the petitioners failed to sign the Power Purchase Agreement within the specified time limit of 30 days of the Letter of Intent. Even proceeding on the basis that the expression, "letter of award" was intended to mean "Letter of Intent", Clause 4.6.3 is required to be read with sub-clause (a) of clause 4.6.5.

> "4.6.3 If any successful Bidder fails to sign the PPA within 30 days of the letter of award, the same shall constitute sufficient ground for annulment of the award to such Bidder and invocation of Bank Guarantee provided by such Bidder.
>
> 4.6.5. The Bank Guarantee can be invoked on account of (but not limited to) the following :-
>
> (a) Failure to sign PPA within 30 days from the date of letter of award, unless the date of signing is extended with mutual consent."
>
> (emphasis supplied)

Read together, they provide that if any successful bidder failed to sign the Power Purchase Agreement within 30 days of the letter of award, unless the date of signing is extended with mutual consent, the same shall constitute sufficient ground for annulment of the award to such bidder.

In the first place, therefore, the parties very much intended that the period of 30 days was capable of being extended and, therefore, it was directory and not mandatory.

Secondly, PPA was admittedly to be signed by both the parties i.e. the Corporation and the successful bidder. Clause 4.6.3, therefore, contemplated that the Corporation owed an obligation to the successful bidder to respond to the request for intimating the date of signing PPA and, thereafter the successful bidder was

obliged to furnish the enhanced bank guarantee before the date intimated for signing PPA.

Thirdly, clause 4.6.3 merely furnished a ground for annulment, that is to say, Clause 4.6.3 did not contemplate automatic cancellation of the letter of award/intent.

Fourthly, we are not impressed by the argument of the Corporation that the Corporation was not required to respond to the petitioners' request for intimating the date of signing PPA because all charges for preparing PPA including legal fee, stamp fee etc. were to be borne by the successful bidder as provided in clause 4.1.4 of RFP. This clause merely required the successful bidder to bear the expenses for preparation and execution of PPA and did not require the successful bidder to prepare PPA. The conduct of the Corporation itself in sending the soft copy of the draft PPA and requiring the successful bidders to return it after filling in all the particulars and also the fact that clause 4.1.4 specifically provided that the charges for preparation and execution of PPA shall be borne by the successful bidders themselves indicate that PPA was to be prepared by the Corporation and all the formalities for execution of PPA like affixing stamp duty etc. were to be done by the Corporation in the first place with the right to get the reimbursement from the successful bidders.

At the cost of repetition, we would say that since power offered by all the three successful bidders under bid No.1 even taken in the aggregate (1590 MW) was less than the power required by the respondent-Corporation under bid No.1 (2000 MW), no businessman would have imagined that even after failure on the part of the Corporation to respond to the requests for indicating convenient date for signing PPA, the Corporation would ever think of cancelling the letters of intent or placing such unreasonable

interpretation on clause 4.6 as it purported to do on 8.1.2007.

16. Now we may look at the detailed chronology given by the petitioners. On 8.12.2006, the Letters of Intent were issued by the respondent-Corporation to the three successful bidders including the two petitioners. On 11.12.2006 the respondent-Corporation sent a soft copy of the Power Purchase Agreement to each of the three successful bidders with a request to fill in the relevant information in the soft copy and return the same to the Corporation. On 18.12.2006, Jindal Power returned the soft copy of the PPA to the Corporation incorporating the relevant details and on 1.1.2007 Jindal Power requested the respondent-Corporation to indicate the convenient date for signing of PPA.

Similarly, on 22.12.2006 PTC India returned the soft copy of PPA to the respondent-Corporation after filling in details and also requested for informing it about the date of signing PPA. On 28 and 30.12.2006, all the three bidders visited the office of the respondent-Corporation.

Considering the fact that clause 4.6.3 required the bidders to submit PPA within 30 days from the date of letter of award (even if it meant Letter of Intent) both the petitioners had requested the respondent-Corporation well in time within 15 days from receiving the Letter of Intent that they may be informed about the convenient date for signing the PPA which would mean the date convenient to the respondent-Corporation. The very fact that even with Adani Enterprises Ltd. (respondent No.2) or Adani Power Pvt. Ltd. (respondent No.3) the respondent-Company did not enter into any Power Purchase Agreement on 6.1.2007 (it was the 30th day from the date of Letter of Intent in case of Adanis also) is more than sufficient to negative the submission of the respondent-Corporation that non-compliance with the terms of clause 4.6.3 disentitled the petitioners from entering into the Power Purchase Agreement.

17. Clause 4.6.4 did not require the petitioners to submit the bank guarantee within 30 days from the date of letter of award (Letter of Intent). As per the relevant clauses in the Power Purchase Agreement, the bank guarantee was required to be "enhanced" to Rs.7.5 lakhs per MW of the contract capacity and at that rate M/s. Jindal Power Ltd. was required to offer bank guarantee of Rs.10.75 crores and M/s. PTC India Ltd. was required to furnish bank guarantees of Rs.14.25 crores for supplying 190 MW of power (Chitrapur) and bank guarantee of Rs. 18.75 crores for supplying 250 MW of power (Ratnagiri). Apart from the fact that the respondent – Corporation has not disputed, and even conceded at the hearing, that the petitioners were and are financially sound to furnish the bank guarantees for the above amounts, PTC India has in fact produced a photostat copy of performance bank guarantee dated 5.1.2007 for a sum of Rs.14.25 crores which was at the rate of Rs.7.5 lakhs per MW for 190 MW of power to be supplied by PTC India Ltd. from Chitrapur. The performance bank guarantee of Rs.18.75 crores for 250 MW of power to be procured from Ratnagiri would also have been provided by PTC India Ltd. if it was given an advance intimation of a specified date for entering into PPA.

18. Seen in light of the above chronology, the interpretation which any reasonable businessman would place on clause 4.6, as well as business background of the two petitioners, the following stand of the respondent-Corporation in the counter affidavit dated 19.2.2007 is most unreasonable and even arbitrary. -

> "whether concerned representative (of the petitioner- PTC India) was waiting for indication of the date for execution of agreement is immaterial and mere preparation of enhanced

bank guarantee would also be immaterial."

PTC India had been stating from day one that it was always ready and willing to sign PPA on the date convenient to the respondent-Corporation and it had made even the following averments in para 17 of the petition, -

> "The petitioner submits that they had completed and returned the Draft Power Purchase Agreement with a request to the Respondent to inform them the formal date of signing the same. Thereafter the Respondent's representatives even met the Petitioners' representatives on 11th of January 2007, and informed the Petitioners that the same would be signed on 12th January 2007 at the venue of the "Vibrant Gujarat Meeting" in Ahmedabad. Hence for the Respondent to then cancel the Letter of Intent is clearly non-est and in violation of the terms of the Agreement as well as the principles of natural justice and thus without jurisdiction and de hors any authority and illegal."

The petition was received by the respondent – Corporation as far back as on 6.2.2007. The respondent – Corporation, however, did not deny the above averments in its first affidavit-in-reply dated 12.2.2007 or in its further affidavit-in-reply dated 19.2.2007 or even in the third affidavit dated 20.2.2007. It was only in the fourth affidavit dated 20.4.2007 that the respondent-Corporation chose to deal with the above averments made in the memo of the petition. It is stated in paragraphs 4 and 5 of the said affidavit that the respondent-Company had not given any invitation to the petitioner or its representative to attend the Vibrant Gujarat Summit on 12.1.2007 and that the respondent-Company had not invited the petitioner-Company or its representative to discuss, coordinate, finalise and execute Power Purchase Agreement and that the respondent-Corporation had never informed the petitioner and its representative for signing of the Power Purchase Agreement during the Vibrant Gujarat Summit on 12.1.2007.

It is not even the case of the respondent – Corporation that during the personal visit of the representatives of the petitioners on 28th and 30th October, 2006, they were informed to come for signing PPA or to furnish performance bank guarantee by 6.1.2007. It is not even stated in the affidavit dated 20.4.2007 on behalf of the respondent-Company that even during the personal visit of the representative of the petitioner-Company to the office of the respondent-Corporation on 11.1.2007, indication was given that the petitioner-Company had committed any default in not furnishing bank guarantee or in not signing the PPA.

19. The Court finds considerable substance in the submission of the petitioners, particularly of PTC India that respondent Nos.2 and 3 (Adani Enterprises Ltd. and Adani Power Pvt. Ltd.) agreeing to reduce the tariff rate under bid No.1 from Rs.3.24 to Rs.2.89 per unit and the decision of the respondent-Corporation to cancel the Letters of Intent earlier issued to the petitioners -both events taking place on 8.1.2007 was not a mere coincidence. Allowing the Adanis to reduce the tariff rate from Rs.3.24 to Rs.2.89 on 8.1.2007 and not giving a similar opportunity to the petitioners, though the State of Gujarat has deficiency of power and the offers received under bid No. 1 were only for 1590 MWs as against required 2000 MW of power and the fact that on the ground of power deficiency in the State, the respondent-Corporation continues to purchase power on temporary basis from the Adani Enterprises Ltd. (respondent No.2) at the average rate ranging from Rs.5.31 to Rs.5.45 per unit or thereabout and that 90% of the power thus procured on short term basis since October 2006 is purchased from Adani Enterprises Ltd. (Rs.322 crores out of the short term power purchase of total Rs.358 crores from October 2006 to August 2007) – these facts are sufficient to substantiate the petitioners' case that the petitioners were

deliberately kept away from signing of Power Purchase Agreements.

20. The only explanation given by the respondent Corporation for not giving an opportunity to the petitioners to reduce the tariff from Rs.3.24 or to match the reduced tariff of Rs.2.89, which offer was made by the Adanis on 8.1.2007, is that the Adanis had furnished the performance bank guarantee of Rs.7.5 lacs per MW of the capacity bid by it and the petitioners had not furnished such bank guarantee within 30 days from the letter of intent.

We have already discussed in para 15 hereinabove that the time limit stipulated in Clause 4.6.3 of the tender documents was required to be read with Clause (a) of Clause 4.6.5 in the same paragraph which provided for extension of the time limit with mutual consent. The time-limit was, therefore, directory and not mandatory. Even that time limit was for signing the PPA and not for furnishing the bank guarantee. Admittedly, even the PPA between the respondent Corporation and the Adanis was not signed within 30 days from the date of the Letter of Intent dated 8.12.2006.

21. In support of the stand justifying annulment on the ground of default on the part of the petitioners, the respondent Corporation has relied on the following decisions for the proposition that if a tenderer has not complied with the conditions of the tender documents strictly, his case cannot be considered and the action of the authority in not accepting his tender cannot be said to be arbitrary.

(i) Global Energy Ltd. vs. Adani Exports Ltd., (2005) 4 SCC 435 (Paras 3, 5, 6, 8 and 10),

(ii) WB State Electricity Board vs. Patel Engineering Co., (2001) 2 SCC 451 (Paras 24 and 25).

(iii) Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation, (2000) 5 SCC 287 (Para 13),

(iv) Rajashtan Co-op. Dairy Federation Ltd. vs. Maha Laxmi Mingrate Marketing Service Pvt. Ltd., (1996) 10 SCC 405 (Paras 4 to 7),

(v) NO Shetty vs. KSRT Corpn. by its Managing Director, Bangalore, AIR 1992 Karnataka 94 (Paras 2 and 5).

22. The above decisions are not applicable to the facts of the present case for several reasons.

22.1 The decisions were rendered in the context of competitive bidding where there are more bidders than the number of contracts put up for sale e.g. where only one contract is to be awarded and there are several bidders. In the instant case, however, the respondent Corporation had invited bids under bid No.1 for minimum 100 MW and maximum 2000 MW of power. The aggregate of power offered to be supplied by the three successive bidders i.e. the present two petitioners and M/s. Adani Enterprises Ltd. was only 1590 MW and therefore, even if the Adanis furnished the bank guarantee on 6.1.2007 within 30 days of the date of the letter of intent, this did not and could not preclude the respondent Corporation from intimating the date for signing PPA and allowing the petitioners herein to furnish similar performance bank guarantees at the rate of Rs.7.5 lacs per MW of contract capacity before such date for signing PPA. In other words, even if the respondent-Corporation had entered into PPA with all the three successful bidders, the respondent Corporation still needed to enter into PPA with even a fourth party which was yet to be found out and admittedly, even till the date of completion of hearing in September, 2007, no such PPA for long term basis is entered into with any fourth party on the terms and conditions applicable under

bid No.1 regarding commencement of supply etc..

22.2 Secondly, the facts in the present case are quite different. There was no default on the part of the petitioners. Within 30 days from the date of Letter of Intent, both the petitioners were requesting the respondent Corporation to indicate the convenient date for signing PPA, meaning thereby, the date convenient to the competent officers of the respondent Corporation. The petitioners had never stated that it was not convenient for the petitioners to sign the PPA within 30 days. If the respondent-Corporation had informed the petitioners a date convenient to the officials of the respondent-Corporation for signing PPA, the petitioners would have furnished bank guarantees before such date. The petitioners' financial capacity to do so was not and has never been doubted. On the contrary, there is documentary evidence in support of such a financial capacity.

22.3 In Global Energy case (supra) the writ petitioner before the High Court (respondent before the Supreme Court) did not possess the requisite license under the Regulations of the Central Electricity Regulatory Commission. The writ petitioner had challenged the condition exempting deposit of EMD by a public sector undertaking. There is no dispute about eligibility of the petitioners either regarding any license or deposit of EMD.

22.4 In WB State Electricity Board vs. Patel Engineering (supra), the Apex Court reversed the decision of the High Court in directing the authority to permit the petitioner-bidder to correct errors in bid documents. The Apex Court also held that Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism.

In the instant case, we have found that the respondent-Corporation has meted out discriminatory and arbitrary treatment

to the petitioners, particularly PTC India Ltd.

22.5 In Monarch Infrastructure (supra) the Apex Court held that since the Notice inviting Tenders required EMD of Rs.1.70 crores in the form of a demand draft/pay order or cash and in no other form, a photostat copy of the draft duly notarized can not be treated as sufficient compliance

In the instant case, EMD was deposited in the form of requisite bank guarantee.

22.6 In Rajasthan Cooperative Dairy Federation Ltd., (supra), the letter of intent issued by the appellant in favour of respondent No.1 was cancelled on 16.7.1990 on several grounds :-

On 1.6.1990, respondent No.1 had agreed to sign the agreement on 12.6.1990 after supplying --

(i) a bank guarantee of Rs.15 lakhs to be furnished by that date,
(ii) its profit and loss account and balance-sheet for the past year.

Respondent No.1 not only did not comply with the above conditions, but also issued an unauthorized advertisement describing himself as the sole selling agent of the appellant.

The Apex Court upheld the cancellation after observing as under:-

> "...The appellant, as a prudent businessman is entitled to satisfy itself about the financial position of the party whom the appellant is appointing as its selling agent. If Respondent 1 has not submitted the requisite documents in this connection and has held itself out as the sole selling agent

> when to its knowledge, there was no intention of appointing Respondent 1 as the sole selling agent, these are valid circumstances which the appellant can take into account in deciding whether to enter into a contract and bind itself legally with Respondent 1 or not. In these circumstances, if the contract has been cancelled it cannot be considered as arbitrary action on the part of the appellant violative of any fundamental rights of Respondent 1."
>
> (emphasis supplied)

In the instant case, the respondent-Corporation has not only not disputed the petitioners' financial position, but the petitioners have also placed on record their financial capacity including photocopy of Performance Bank Guarantee dated 5.1.2007 of Rs.14.25 crores in case of PTC India and Banker's Certificate in case of Jindal Power.

DISCUSSION ON THE SECOND CONTROVERSY – Tariff Rate

23. We may now turn to the second defence of the respondent Corporation to justify its decision dated 8.1.2007 for cancelling the Letter of Intent dated 8.12.2006. The relevant portion of the decision dated 8.1.2007 stated as under :-

> "Sub.: Cancellation of Letter of Intent issued to the successful bidder for Bid No.01/LTPP/2006.
>
> .... (after referring to clauses 4.6.3 and 4.6.4 of RFP Document of Bid No.1)
>
> In view of the above provisions of the RFP it can be inferred that the successful selected bidders were required to submit the Enhanced Bank Guarantee within 30 days of issue of Letter of Intent.
>
> M/s Adani Power Private Ltd. the Seller on behalf of M/s Adani Enterprises Ltd., has forwarded the Enhanced Bank Guarantee vide letter dated 5th Jan 2007 which we received on 6/1/07, with a request to convey the convenient date signing of PPA.
>
> M/s Jindal Power Ltd. have conveyed their acceptance of the Offer and requested for intimation of convenient date of signing of PPA. However, the required Enhanced Bank Guarantee has not been submitted till date even after elapse of considerable

time period. Similar is the case with M/s PTC India Ltd.

In view of the fact that M/s Jindal Power Ltd. and M/s PTC India Ltd. have yet not submitted the Enhanced Bank Guarantee required under the clause 4.6.4 of RFP documents of Bid No. 01/LTPP/2006, GUVNL may cancel the LOI issued to M/s Jindal Power Ltd. and M/s. PTC India Ltd.

Further, in view of the tariff quoted by bidders under Bid No. 02/LTPP/2006 & Bid No. 03/LTPP/2006, GUVNL is also not keen on procuring power from Bidders of Bid No. 01/LTPP/2006, at tariffs quoted by them. Therefore, GUVNL may not encash the Bank Guarantee submitted by M/s Jindal Power Ltd. and M/s. PTC India Ltd. along with the RFP and release the same.

This is put up for perusal and approval please.

Sd/-
8/01/2007
COA (Comm.)"

This note was approved by the entire hierarchy in the Corporation.

24. When the decision was taken on 8.1.2007, the rates available to the respondent Corporation for bid Nos.1, 2 and 3 were as under :-

Sr. No	Name of Parties	Bid No.	Capacity offered in MWs	Levelised tariff Rs. per unit	Date of opening bids	Date of signing PPA
	(A)	(B)	(C)	(D)	(E)	(F)
1	Aryan Coal Benefication Pvt. Ltd.	Bid No.2	200	2.25	4.1.07	26.02.07
2	Adani Power Pvt. Ltd. (Respondent No.3)	Bid No.2	1000	2.35	"	02.02.07
3	Essar Power Ltd.	Bid No.3	1000	2.40	"	26.02.07
4	Adani Power Pvt. Ltd. (Respondent No.3)	Bid No.1	1000	3.24 reduced to 2.89	Reduced on 8.1.07	06.02.07
5	PTC India Ltd. (Petitioner)	Bid No.1	190 + 250 440	3.24 Ready for 2.89	Opportunity not given to reduce	Decision to cancel LOI
6	Jindal Power Ltd.	Bid No.1	150	3.24	"	"

The above chart prepared on the basis of Annexure-A1 produced by the respondent Corporation in compliance with our order dated 22.8.2007 would show that the respondent Corporation thought it fit to enter into PPA with M/s. Adani Power Ltd. (respondent No.3) for purchasing 1000 MW of power at the rate of Rs.2.35 per unit under bid No. 2 on the basis of the bids received on 4.1.2007 [Para 4(f) of counter affidavit dated 5.2.2007] and that PPA was signed on 2.2.2007. Even then the same respondent Corporation negotiated behind the back of the petitioners, with the same third respondent for purchasing 1000 MW of power under bid No. 1 at the rate of Rs.2.89 per unit and executed PPA in favour of the third respondent on 6.2.2007. Ad-interim injunction was already granted by this Court in the petition of M/s. Jindal Power Ltd. on 24.1.2007 restraining the respondent Corporation from executing any such Agreement. The ad-interim injunction was vacated on 6.2.2007 and the Corporation executed PPA in favour of the third respondent on the same day.

25. As pointed out by the petitioners, the rates for bid No.1 cannot be compared with the rate of tariffs received under bid Nos.2 and 3 because the chart in Para 2.3 herein above would show that bid No.1 requires commencement of power supply within 36 months from signing of PPA, whereas under bid Nos.2 and 3, power supply is to commence within 60 months from signing of PPA. Moreover, under bid No.1 variable and capacity charges are to be quoted for 25 years (year-wise) on which no escalation will be allowed. On the other hand, under bid Nos.2 and 3, capacity charges are escalable and non-escalable variable charges are linked to index. Thus, the tariff rates under bid No.1 on the one hand and tariff rates for bid Nos.2 and 3 on the other hand are not at all comparable. Even the stand of the respondent-Corporation in its affidavit dated 20.2.2007 (Para 6-g) was as under :-

> "(g) As is evident from above paras (b), (c) and (d), each of the three bids are mutually exclusive, different and independent and more particularly bid No.01/LTPP/2006 is far more mutually exclusive, different and independent from bid Nos.02/LTPP/2006 and 03/LTPP/2006."

Even if they could be treated as relevant, the respondent Corporation thought it prudent and reasonable to enter into PPA with the third respondent – M/s. Adani Power Pvt. Ltd. for purchasing 1000 MW of power at the rate of Rs.2.89 per unit but refused and even now refuses to give PTC India any opportunity to reduce the tariff from the agreed rate of Rs.3.24 as indicated in the Letter of Intent dated 8.12.2006 to Rs.2.89 per unit.

26. It is interesting to refer to the figures given by the respondent Corporation to justify its decision not to enter into PPA with PTC India for purchasing 440 MW of power at the rate of Rs.2.89 per unit. The following figures are given in its affidavit dated 18.8.2007 (para 16) :-

Considering the capacity offered of 590 MW which was proposed to be supplied by the petitioners – M/s. PTC India Ltd. and M/s. Jindal Power Ltd., if electricity is purchased by the respondent Corporation at the levelised tariff of Rs.2.89 per unit, then the total cost would come to Rs.1195/- crores per annum. Similarly, if electricity can be permitted to be purchased by the respondent Corporation at levelised tariff of Rs.2.20 per unit (the rate offered by KSK Energy Ltd.) then the total cost would come down to Rs.909 crores per annum which would save Rs.286 crores per annum and saving of about Rs.7150 crores over the period of for 25 years.

In a comparative table the above figures are placed in column (A). If the respondent Corporation had cared to apply the same logic to the burden taken upon itself on the basis of the PPA with respondent No.3 at the rate of Rs.2.89, the figures would read as indicated in column (B) :-

Additional Burden on account of entering into PPA at the rate of Rs.2.89 per unit

	With Petitioners	With Respondent No.3
	(A)	(B)
Power capacity MW	590	1000
Annual burden	Rs. 286 crores	Rs.484 crores
Burden over 25 years	Rs.7150 cores	Rs.12118 crores

While the figures in Table A are those indicated in Paragraph 16 of the respondent-Corporation's affidavit dated 18.8.2007, the figures in Column B are worked out by applying the rule of three. Working out the exact amount on the basis of the varying rates applicable for the relevant years may result into minor variations, but the fact remains that the respondent Corporation is not in a position to dispute that the respondent Corporation was eager to purchase power from M/s. Adani Power Pvt. Ltd. - respondent No.3 at the rate of Rs.2.89 per unit for a period of 25 years from February 2010 by entering into the PPA on 6.2.2007, but refused to give the same opportunity to the petitioners on 8.1.2007 even after admitting power shortage which necessitates purchase of power on short term basis at the rate of Rs.5.45 per unit from respondent No.2 – Adani Enterprises – in the last eleven months power is purchased from respondent No.2 on short term basis to the tune of Rs.322 crores.

27. Therefore, even in September 2007, M/s. PTC India Ltd. has stated that if the PPA is entered into in September 2007, the petitioners will make best efforts to commence such supply by March 2010. It stands by its offer to sell 440 MW power to the respondent Corporation at a levelised tariff of Rs.2.89 per unit as per the tariff stream to be submitted to the respondent Corporation for a period of 25 years commencing from three years from the execution of PPA in favour of the petitioner and that on the assumption that the PPA will be executed in September 2007, PTC India shall make best efforts to commence such power supply within 30 months, but for the period of eight months lost on account of the arbitrary refusal of the respondent Corporation to give PTC India similar opportunity to reduce the tariff, the petitioner should not be subjected to any penalty by way of liquidated damages or otherwise for any default in supplying the power within 30 months.

28. Having carefully gone through the record and having anxiously considered the submissions made on behalf of the respondent Corporation, the Court finds that the respondent Corporation has referred to various offers for supplying power at the rates lower than Rs.2.89 per unit, but in the last nine months has not entered into any PPA except under bid Nos.1, 2 and 3. The Court's attention is not even invited to any notice inviting tenders for supplying power at any such rates lower than Rs.2.89 on the same terms and conditions as contained in the PPA entered into with the third respondent under bid No. 1. This coupled with the fact that the respondent Corporation has been purchasing power from the second respondent – (both M/s Adani Enterprises Ltd. - second respondent and M/s Adani Power Pvt. Ltd. - third respondent are admittedly belonging to the same Adani group) on a short term basis at the average rate of Rs.5.31 to 5.45 per unit since October 2006 and the amount being paid for such short term

purchase from the Adani group has been shown to be Rs.322.01 crores from October 2006 to August, 2007, as against power purchased from other suppliers on short term basis aggregating to only Rs.36.35 crores during the same period, the Court finds considerable substance in the submissions of the petitioners and particularly PTC India that the decisions of the respondent Corporation impugned in these petitions were not bona fide, but were made with a view to engineer an appearance of default so as to weed out the other successful bidders like M/s PTC India Ltd. from the arena. Yes, “from the arena”, and not “from the competition”, because there is no competition. There was and is enough power demand – to accept the power offered by the respondent – Adanis as well as by the petitioners.

29. At the hearing, reference was made to the advantage the Adani Group of Industries (to which the second and third respondents belong) have of “local accessibility”. In view of the findings already given earlier, it is not necessary to look into this issue.

30. The respondent Corporation through the learned Advocate General had already made a statement before this Court on 22.2.2007 which was also reiterated before the Hon'ble Supreme Court on 26.3.2007 that in the event of the petitioner PTC India finally succeeding in the matter, they will be accommodated for the purpose of bid No. 1 in respect of their offered quantity of 440 MW of power. In view of the readiness and willingness of PTC India to enter into PPA at the levelized average tariff rate of Rs.2.89 per unit, we direct the respondent Corporation to enter into a similar PPA with PTC India Ltd. which it has entered into with the third respondent.

31. However, as far as Jindal Power is concerned, it is not prepared to reduce its price from Rs.3.24 per unit (as indicated in

the Letter of Intent dated 8.12.2006) to Rs.2.89 per unit. Letter of Intent is an expression of intent and not a binding enforceable agreement. Since Jindal Power is not ready and willing to reduce the rate so as to match the rate offered by the third respondent and PTC India i.e. Rs.2.89 per unit, no mandamus can be issued in favour of Jindal Power.

32. In the result, the petitions are disposed of in the following terms :-

(i) Special Civil Application No.3514 of 2007 is allowed. Respondent No.1 is directed to enter into the Power Purchase Agreement (PPA) with petitioner – M/s. PTC India Ltd. at the levelised rate of Rs.2.89 per unit on the same terms and conditions which were incorporated in the PPA dated 6.2.2007 between the respondent Corporation and M/s. Adani Power Pvt. Ltd. - third respondent, within one month from today.

(ii) Special Civil Application No.2186 of 2007 is disposed of after recording the statement made by Mr. K.S. Nanavati, learned counsel for petitioner -M/s. Jindal Power Ltd. to the effect that it is not prepared to offer power to the respondent Corporation at the levelised tariff of R.2.89 per unit under bid No.1, but that M/s. Jindal Power Ltd. is prepared to offer 100 MW of power to the respondent Corporation at the levelised tariff of Rs.3.2483 for a period of seven years commencing from 16.6.2008 provided advance intimation of at least three months is given before requiring the petitioner Company to supply the power at the above rate and from the above date. (A detailed pricing year-wise is indicated in their letter dated 30.8.2007 addressed to their advocates – M/s. Nanavati Associates, which letter is placed by them on the record of the petition).

(iii) The respondent Corporation shall take into account the above

offer of M/s. Jindal Power Ltd. before purchasing power on short term basis from any other supplier from 16.6.2008 onwards.

33. Since both the petitions are disposed of, the Civil Applications are also disposed of.

[M.S. SHAH, J.]

[K.A. PUJ, J.]